Filed 2/15/05 P.v . Caddell CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRETT CADDELL, Defendant and Appellant.	E035320 (Super.Ct.No. FSB040928) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed.

James R. McGrath, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Scott C. Taylor, Supervising Deputy Attorney General, and Daniel Rogers, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant guilty of second degree robbery (Pen. Code, § 211)[1] as charged in count 1, and petty theft (§ 484, subd. (a)), a lesser included offense of second degree robbery as charged in count 2. The trial court thereafter sentenced defendant to three years in state prison on count 1 and stayed a two-year term on count 2 pursuant to section 654. Defendant's sole contention on appeal is that there was insufficient evidence to sustain his robbery conviction. We reject this contention and affirm the judgment.

I

FACTUAL BACKGROUND

On September 2, 2003, Mylene Gregorio was working as a drive-through cashier at a Del Taco restaurant in San Bernardino when defendant entered the restaurant, jumped over the counter, and went towards Gregorio's cash register. Gregorio, who was standing near the cash register, was frightened, as it appeared defendant was charging at her and would have hurt her if she got in his way. Defendant brushed Gregorio as he approached the cash register. Defendant tried opening the cash drawer by pushing buttons on the register. When he could not open the drawer, defendant demanded that someone open the cash register. Being fearful of and nearest to defendant, Gregorio complied by opening the register drawer for him. Defendant then took all of the money from the cash register tray, checked for additional cash under the tray, jumped back over the counter, and fled the store. Defendant obtained about $80 to $90. Defendant did not appear to have a weapon.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

Defendant testified that he entered the Del Taco with the intent to take money from a cash register if one was left open to feed and house his girlfriend and his seven-month-old daughter. He admitted jumping over the counter; going to a cash register where the youngest and smallest employee, Gregorio, was working; taking the money from the immediate presence of the employees after Gregorio opened the cash register; and then fleeing the store with no intention of returning the money. He also admitted that he outsized all of the employees and that he scared them. However, defendant denied directly approaching Gregorio and denied ordering anyone to open the cash drawer.

II

DISCUSSION

Defendant contends there was insufficient evidence to sustain his robbery conviction (count 1 as to Gregorio) and that the evidence supports a petty theft conviction instead. Specifically, he argues that the evidence did not support the conclusion that he took the money from the immediate presence of anyone entitled to the money and that he did not use force or fear to accomplish the taking. We disagree.

Our review of any claim of insufficiency of the evidence is limited. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. Bolin* (1998) 18 Cal.4th 297, 331 and *People v. Parra* (1999) 70 Cal.App.4th 222, 225.) If the verdict is supported by substantial evidence, we

are bound to give due deference to the trier of fact and not retry the case ourselves. (*Jackson v. Virginia* (1979) 443 U. S. 307, 319, 326; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Lewis* (2001) 26 Cal.4th 334, 361; *People v. Franz* (2001) 88 Cal.App.4th 1426, 1447; *People v. Hale* (1999) 75 Cal.App.4th 94, 105.) The standard of review applies even "when the conviction rests primarily on circumstantial evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"Section 211 defines robbery as the felonious taking of personal property in the possession of another from his or her person or immediate presence and against his or her will accomplished by means of force or fear." (*People v. Brew* (1991) 2 Cal.App.4th 99, 103; see also § 211.) The crime is essentially a theft with two aggravating factors: a taking (1) from victim's person or immediate presence and (2) accomplished by the use of force or fear. (*People v. Marquez* (2000) 78 Cal.App.4th 1302, 1308; see *People v. Avery* (2002) 27 Cal.4th 49, 53, fn. 4; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1707.)

"The taking element of robbery itself has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165.) "Immediate presence" is spatially, not temporally, descriptive and thus "refer[s] to the area from which the property is taken, not how far it is taken." (*Id*. at p. 1166, italics omitted.) Our Supreme Court in *People v. Hayes* (1990) 52 Cal.3d 577 defined "immediate presence" as "'"[a] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection,

observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it."' [Citations.] Thus, . . . immediate presence '"must mean at least an area within which the victim could reasonably be expected to exercise some physical control over [her] property."' [Citation.] Under this definition, property may be found to be in the victim's immediate presence 'even though it is located in another room of the house, or in another building on [the] premises.' [Citations.]" (*Id*. at pp. 626-627.)

Here, there is substantial evidence to show that defendant took the money from Gregorio's immediate presence. Defendant jumped over the counter while Gregorio was at the drive-through cash register. He went directly to Gregorio's cash register and tried to get it open, failed, and demanded that someone open it for him. Gregorio, being fearful of and closest to defendant, complied with the request. Defendant was in the immediate proximity of Gregorio. This evidence is sufficient to establish the "immediate presence" requirement.

Defendant, however, argues that Gregorio as a mere Del Taco employee was not entitled to the money in the cash register and thus did not possess the property taken. We reject this contention.

The victim's possession of the property may be either actual or constructive, and it need not be exclusive. (*People v. Miller* (1977) 18 Cal.3d 873, 880-881, overruled on another ground in *People v. Oates* (2004) 32 Cal.4th 1048, 1067-1068, fn. 8; see also *People v. Estes* (1983) 147 Cal.App.3d 23, 27.) "Actual possession requires direct physical control, whereas constructive possession can exist when a person without immediate physical control has the right to control the property, either directly or through another person." (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1111-1112.) More

than one person can constructively possess personal property at the same time and be a victim of robbery of the same offender. (*Miller*, at p. 881.) A single taking of property possessed jointly by more than one person, all of whom are subjected to force or fear, constitutes robbery as to each victim. (*People v. Ramos* (1982) 30 Cal.3d 553, 589, revd. on other grounds in *California v. Ramos* (1983) 463 U.S. 992.)

The California appellate courts have repeatedly upheld robbery convictions where an employee of a business, a visitor to the business, or nonemployee "contract workers" were found to constructively possess the property stolen from the business. (See *People v. Nguyen* (2000) 24 Cal.4th 756, 761-762; *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 521.) Constructive possession of an employer's property has been found even when the victim employee did not have cash-handling responsibilities or access to the stolen property. (See, e.g., *People v. Jones* (2000) 82 Cal.App.4th 485, 490; *People v. Jones* (1996) 42 Cal.App.4th 1047, 1054; *People v. Downs* (1952) 114 Cal.App.2d 758, 766.) Whether employee status alone is enough to give an employee constructive possession of the employer's stolen property is presently the subject of conflicting Court of Appeal decisions. (Compare *People v. Jones*, *supra*, 82 Cal.App.4th at p. 491 ["business employees -- whatever their function -- have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner"] with *People v. Guerin* (1972) 22 Cal.App.3d 775, 782, overruled on another ground in *People v. Ramos*, *supra*, 30 Cal.3d 553 [box boy employee without dominion or control over employer's money did not have constructive possession of the money].)

In *Frazer* the defendant was convicted of eight counts of robbery of eight Kragen Auto Parts employees. The robberies occurred at two different Kragen Auto Parts stores

on two different dates. On each occasion, there was a store manager present who could open the safe; the other six employees were "nonmanagerial employees" who were in the stores helping customers, stocking merchandise, and "putting parts away." (*People v. Frazer*, *supra*, 106 Cal.App.4th at pp. 1108-1109.) In both instances, the store manger opened the safe for the robber while the other employees lay on the store floor. (*Id*. at p. 1110.) The court reviewed the development of case law in this area, including the conflicting decisions concerning the significance of employee status, and concluded that "a fact-based inquiry regarding constructive possession by an employee victim is appropriate." (*Id*. at p. 1115.) "[T]he proper standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property is whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property. Under this standard, employee status does not alone as a matter of law establish constructive possession. Rather, the record must show indicia of express or implied authority under the particular circumstances of the case." (*Ibid*.)[2]

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[2] To support this conclusion, and reject the notion that the Supreme Court in *Nguyen* clearly held that all employees (by virtue of their employee status) have constructive possession of their employer's property, the *Frazer* court stated: "In *People v. Nguyen* . . . , our Supreme Court summarized the evolving judicial interpretation of the crime of robbery, noting that 'the theory of constructive possession has been used to expand the concept of possession to include employees and others as robbery victims . . . . ' *Nguyen* sets forth in dicta the statement in the majority opinion in [*People v.*] *Jones I*, *supra*, 42 Cal.App.4th at page 1054, that the store truck driver had 'sufficient representative capacity with respect to the owner of the property to be the victim of robbery.' [Citation.] The issue in *Nguyen* was whether a *visitor* at a business could be a robbery victim, and the court held it was improper to instruct the jury in a manner which removed the element of possession from the crime of robbery so as to allow a conviction merely based on a forceful taking in the presence of the visitor. [Citation.] However,

[footnote continued on next page]

Applying this standard, the *Frazer* court concluded there was sufficient evidence to support the multiple robbery convictions. "[T]o the extent nonmanagerial employees could access the cash registers and/or product inventory in order to service the customers," the court explained, they "could reasonably be viewed as having implied authority over whatever property was necessary to handle the sales, including the money in the safe through the manager." (*Frazer*, *supra*, 106 Cal.App.4th at p. 1119.) The jury could reasonably have concluded "that the entire staff interchangeably stocked shelves, serviced the customers, and had access to the cash registers and (via the manager) the safe, with their primary duties depending on how they were scheduled for that particular shift." (*Ibid*.) The *Frazer* court's analysis is persuasive, and we apply this standard to the facts disclosed by the record in this case.

Here, as in *Frazer*, the circumstances indicate the victim employee was in a sufficient representative capacity to her employer so as to have express or implied authority over the property. Gregorio, who was employed by Del Taco, was the drive-through cashier at Del Taco and had access to the cash register. Even more than like the nonmanagerial employees in *Frazer*, Gregorio clearly had access to Del Taco's money as well as the "product inventory in order to service the customers . . . ." (*People v. Frazer*, *supra*, 106 Cal.App.4th at p. 1119.) In addition, Cruz, the restaurant manager, was standing near her as defendant entered the restaurant. From Gregorio's obvious position as a Del Taco employee helping customers in the presence of the manager and having

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[footnote continued from previous page]
Nguyen was not presented with, nor does it address, the issue of the appropriate standard to evaluate an employee's constructive possession." (*People v. Frazer*, *supra*, 106 Cal.App.4th at p. 1114.)

access to the cash register, the jury could reasonably conclude that she had sufficient representative capacity so as to have at least implied authority over Del Taco's property and money. (See *id*. at p. 1115.)

Defendant next argues that there was insufficient evidence of force or fear. The uncontradicted evidence, however, shows that Gregorio as well as other employees were afraid when defendant jumped over the counter. Gregorio was also afraid when defendant demanded that someone open the cash register drawer for him. Indeed, Gregorio opened the cash register drawer for defendant *because* she was afraid. Moreover, defendant admitted that he scared the employees and that he outsized them.

"The force required for robbery is more than 'just the quantum of force which is necessary to accomplish the mere seizing of the property.' [Citation.]" (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, disapproved on another ground in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 2.) The fear required for robbery is fear of an unlawful injury to the person or property of the victim, any relative or family member of the victim, or anyone in the victim's company at the time of the robbery. (§ 212.) The jury here reasonably could have concluded defendant used force or fear to accomplish the robbery against Gregorio.

Viewing the evidence in the light most favorable to the People, we conclude there was sufficient evidence supporting the jury's verdict that defendant committed the robbery as alleged in count 1.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.